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Backgrounder

LRC 93—Report on the Buyer's Lien: A New Consumer Remedy

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In consumer transactions situations sometimes arise whereby a buyer will pay for goods before they are delivered to them. There are several reasons for this. The goods may not as yet have been manufactured, the seller may deal with the buyer on a mail order basis, or it may simply be the case that the goods are too large or bulky to be transported by the buyer in person. If the seller subsequently becomes insolvent before delivery of the goods, the buyer's position is very precarious. Whether the buyer obtains the goods depends on the technical question of whether title in those goods has passed to the buyer as determined by the *Sale of Goods Act*. The report contains a brief summary of the relevant sections of the Act dealing with the transfer of title in consumer goods.

The report commences by posing a question as to whether there is a case for reform to improve the position of the buyer in these circumstances. Arguments both for and against reform are discussed and the conclusion reached is that the arguments in favour of reform outweigh preserving the status quo.

The report then goes on to consider two potential options for enhancing the position of the buyer. The first option would be to amend the *Bankruptcy and Insolvency Act* to effectively give the buyer a preferred position as against creditors. While this would be the most direct option, the report concludes that it is beyond the scope of a provincial law reform agency to recommend changes to the *Bankruptcy and Insolvency Act*.

The second option suggested is to create a structure of property rights that would come into existence when a prepayment is made by a buyer. The approach recommended is a buyer's lien, which is essentially a type of security interest that secures payment or performance of an obligation. The lien would attach to two types of asset. The first would be the mass of goods in the seller's inventory, any item of which meets the description of the goods, which are the subject matter of the sale. The second type of asset subject to a lien would be the deposit account into which the proceeds of retail sales are deposited by the seller in the usual course of his business.

The report considers the priority of the buyer's lien in relation to other security interests in the goods that may potentially arise. As regards consensual security interests, such as a secured creditor, a recommendation is made that a buyer's lien should have priority. The report recognizes that non-consensual interests arising by operation of law, such as other unregistered liens are a problem. It suggests that the answer to the problem has been addressed in an earlier report¹ that recommended the abolition of most statutory liens with the remainder being brought under a defined priority structure. There is also the issue of a second buyer who purchases goods unaware that they are already subject to a first buyer's lien. The report recommends that the subsequent buyer should be protected and take the goods free of the lien.

Practical issues surrounding the administration and enforcement of a buyer's lien are also considered. It suggests that difficult administration problems are unlikely to arise as the kind of situations in which the buyer's lien over goods acquires real significance is likely to be limited to a small number of familiar sorts of retailing operations. It also believes that a lien over goods is less likely to arise than a lien over deposit accounts and that this will cause fewer practical difficulties. One potential difficulty noted is the role of the professional trustee appointed to assume control and liquidate a seller's property for the benefit of creditors. They may not be aware of a buyer's lien, which raises the spectra of being sued for damages if they subsequently dispose of an asset, which is subject to a lien. A recommendation is made therefore that a subsequent purchaser of goods should take free of the buyer's lien.

The final issue addressed in the report is the constitutional implications arising from the introduction of a buyer's lien. The general reservation is that legislation might be viewed by the courts as legislation respecting insolvency and thus a federal rather than provincial matter. There is a risk therefore that the legislation might be rejected. While the report recognizes this threat, it is confident that the proposed new legislation would not be struck down.

The report includes draft legislation which it recommends be added to the existing *Sale of Goods Act*.

Further Developments

See *Sale of Goods Act*, R.S.B.C 1996, c. 410, ss. 74–81.

¹ See Law Reform Commission of British Columbia, *The Crown as Creditor: Priorities and Privileges* (LRC 57, 1982)